The second fundamental deficiency of the Petition is its *ex post facto* effort to minimize plaintiffs' factual claims as charging mere recklessness or gross negligence. This gambit cannot be squared with plaintiffs' steadfastly maintained claims of an elaborate, multifaceted "scheme and plan" which was "designed precisely to prevent the Court from performing its function of impartially adjudging cases." *Infra* at n. 3. Indeed, in a prior submission to this Court, Petitioners directly charged that their adversaries had "knowingly and intentionally violated the law." *Herzfeld & Rubin, P.C. v. Robinson*, (No. 91-715), Brief in Opposition to Petition for Certiorari ("*H&R v. Robinson*, Opp.") at 13. Even on the present Petition, plaintiffs maintain that the charged acts by defense counsel "were specifically designed to suppress" the relevant facts. Pet. at 4. Against this background, the district court's dispositive finding — "[N]owhere . . . does there appear clear and convincing evidence that defense counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud this Court through misrepresentation and non-disclosure" (App. at 47) — was a factual finding, pure and simple, which the Court of Appeals found "directly responsive to the claim asserted by plaintiffs." App. at 21. On this ground as well, the Petition fails at the threshold.

**Background**

In the first decade of this litigation, from 1977 to1986, plaintiffs lost on the merits at trial and in two appeals to the Tenth Circuit. *Robinson v. Audi NSU Auto Union* 739 F.2d 1481 (10th Cir. 1984); *Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572 (10th Cir. 1986). Since 1987, they have pursued a two-pronged strategy to continue this suit despite the twice

affirmed adverse judgment. First, they sought to relitigate the underlying action under Oklahoma common law, notwithstanding the prior judgment, by suing opposing counsel and the corporate parent of the defendants in the underlying suit, alleging the same causes of action on which they previously lost, plus alleged fraud perpetrated against them by their adversaries in securing that outcome. The second prong of their attack took the form of an independent action under Rule 60(b), Fed.R.Civ.P., against their former trial adversaries, seeking relief from the previously entered final judgment based upon alleged "fraud on the court."

The present Petition challenges the Tenth Circuit's affirmance on appeal of the district court's dispositive finding that these charges, though sufficient in law, were comprehensively unproven. Petitioners also question the Tenth Circuit's application of traditional principles of claim and issue preclusion under doctrines of *res judicata* and collateral estoppel to foreclose their attempt to use a purported Oklahoma law common law fraud action as a device to avoid the requirements of Rule 60(b).

A detailed history of the underlying litigation is set forth in the circuit court's decisions. In the interest of brevity, we incorporate these passages by reference. App. 3 - 6; 25 - 27.[1] The following factual statement, fulsome as it may appear, highlights only those aspects of that history which we view as having been omitted or misstated by petitioners or which otherwise bear directly on our opposition to the Petition.

The history of plaintiffs' charges makes it inescapably clear that plaintiffs, at all times until they discovered that

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1. The appendix to the Petition is cited as "App. __," and portions of the record in the Court of Appeals are cited as in the decisions below.

they had lost the case, charged defendants with exactly what the district court ultimately found they had failed to prove — a "'deliberately planned and carefully executed scheme' to defraud the court through misrepresentation and non-disclosure." The district court's rejection of that charge in almost the exact words in which plaintiffs advanced it was a simple, garden variety factual finding, on the basis of which one party to a litigation prevailed. The Petitions' effort to concoct "certworthy" issues of law from their loss at trial on the facts merits no consideration from this Court.

**The Complaint — "A Scheme and Plan to Prevent the Disclosure of the True Facts" — Motion to Dismiss Denied — Allegations That "The Attorneys For the Defendants Lied"**

According to the complaint,[2] each of the multitude of wrongs which plaintiffs charged the defense with having committed was part of a deliberately conceived "scheme and plan" to suppress the "true facts" concerning the corporate relationship between Audi and its parent VWAG. (Aplt.App. at 8, ¶¶18-20)[3] The complaint made the extraordinary charge

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2. Unless otherwise noted, references to pleadings and submissions below relate to plaintiffs' action for fraud on the court, No. 92-5238 in the Tenth Circuit, which the Court of Appeals found to be factually identical to plaintiffs' action for common law fraud. No. 93-5168 below.

3. 18. [Defense counsel] made false representations concerning the design and the development of the Audi 100 LS and the relationship of VWAG to that design and to Auto Union GmbH and Audi NSU . . .. The true facts are set forth with particularity

(continued...)

that one individual attorney, a member of the defense team, was both the architect and linchpin of these sophisticated, single-minded and indeed virtually clairvoyant machinations, which extended over a three year period and involved a broad array of acts of professional misconduct in both the Oklahoma and federal court systems. (*Id.* ¶¶ 21-65) Specific allegations concerning the acts, statements and state of mind of this lawyer appear over thirty times in the complaint.[4]

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3. (...continued)

> in Paragraphs 22 through 37 herein. The representations are set forth in particularity in Paragraphs 46 through 51 herein. The knowledge of the defendants and H&R, their attorneys, . . ., are set forth in Paragraphs 38 through 45 herein.
> 19. These false representations were directed at the judicial machinery itself and were a fabrication of evidence by a party in which an attorney is implicated. . . . This fraud . . . was designed precisely to prevent the Court from performing its function of impartially adjudging cases. . . .
> 20. The false representations were made as part of a scheme and plan to prevent the disclosure of the true facts concerning the relationship of VWAG to the design and manufacture of the Audi 100LS and its relationship with Auto Union GmbH and Audi NSU. In addition to the representations made by [defense counsel], the scheme and plan was implemented through making false and fraudulent answers to interrogatories and in discovery. The acts which were performed to implement this scheme and plan are set out particularly in Paragraphs 52(e) and 54 through 65 herein.

4. Complaint (Aplt.App. at 1-39) ¶14, ¶18 (3 times), ¶20 (continued...)

Confirming the inherently intentional nature of the "scheme or plan," the complaint directly alleges that "This fraud . . . was designed precisely to prevent the Court from performing its function of impartially adjudging cases." (*Id.* ¶19)[5]

The district court upheld the legal sufficiency of plaintiffs' charges from the start of the case. In its own words, ". . . the [district] Court opined that the allegations of 'a scheme by VWAG, its subsidiaries and its attorneys . . .' and the allegations that 'the attorneys for defendants lied . . .' were sufficient to state a claim under Rule 60(b)." App. at 52 As plaintiffs stated to this Court, this was a holding that "if the facts alleged [in the complaint] are true, they constitute fraud on the court." *H&R v. Robinson*, Opp. at 2.

**Opposition to Certiorari in No. 91-715 — Defense Counsel "Knowingly and Intentionally Violated the Law."**

Defendants' challenge to other aspects of the above-quoted ruling led to a petition for certiorari, No. 91-715 in this Court, on the issue of civil damage immunity to defense counsel. In their opposition to that petition, plaintiffs devoted a full page of their Brief in opposition to a complete quotation

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4. (...continued)
(specifically identified as an architect and/or instrument of the alleged "scheme or plan"), heading before ¶¶ 38-45, ¶43 (twice), ¶44 (H&R charged with various alleged categories of "knowledge" of Shapiro), ¶45 (nine separately designated subcategories of Shapiro's alleged knowledge, imputed to H&R), heading before ¶¶46-51, ¶46, ¶47 (twice), ¶48 (twice), ¶49 (twice), ¶50 (four times), ¶51, ¶52, ¶57(twice).

5. Accord, Pet. at 4 ("The misrepresentations and omissions were designed to suppress the role of . . . VWAG . . .")

of the district court's characterization of their charges of a "scheme or plan" in the course of which "throughout discovery and at trial, the attorneys for defendants lied." At the conclusion of the quotation, plaintiffs stated that "This the factual predicate upon which this case stands." *H&R v. Robinson*, Opp. at 3-4. This was not an isolated reference. The "Question Presented" in their brief directly accused the defense of "a broad fraudulent scheme which includes 1) lying by the attorney directly to the judge as well as to opposing counsel; 2) false answers to crucial discovery requests; and, 3) other acts of misconduct outside the courtroom . . ." *Id* at i. The brief concluded by directly charging that defense counsel had "knowingly and intentionally violated the law." *Id.* at 13. This Court denied the writ. *Herzfeld & Rubin, P.C. v. Robinson*, 112 S.Ct. 1160 (1992)

**Pre-Trial Contentions — All Claimed Acts of Misconduct Were "Part of a Scheme and Plan to Deceive the Court . . . and "Designed to Conceal or Obscure" the Relevant Facts.**

In the Pre-trial Order, plaintiffs reiterated their factual claim that all alleged acts of misconduct, regardless of the specific state of mind involved in any particular incident, were part of a "scheme and plan" knowingly and intentionally "designed" to subvert the integrity of the judicial process:

> 1. Plaintiffs contend that Defendants, acting by and through their attorneys, . . . made false statements or made statements which omitted to state material facts, which omissions made the statements materially false and misleading in answering interrogatories and in representations made . . . to the court.

2. Plaintiffs contend that Defendants knew that the answers and representations were either (a) untrue, or (b) in the exercise of reasonable diligence, would be found to be untrue, or (c) made with reckless disregard for the truth, or (d) were made in the context of volunteering information which omitted to state material facts, which omissions made the statements materially false and misleading.

3. *Plaintiffs contend that the representations to the court and answers to the interrogatories were part of a scheme and plan to deceive the court . . . and designed to conceal or obscure the relationship between VWAG and Auto Union or Audi NSU* and thereby prevent any admissions of VWAG from being introduced into evidence against Audi at the first trial.

Aples. Supp. App. at 152. (emphasis added) The alleged "scheme and plan" by the defendants' attorney remained the indispensible core of plaintiffs' claims.[6]

**Proposed Findings and Conclusions After Trial — "The Record Establishes That the Court Was Intentionally Lied To," and shows "The Involvement of an Officer of the Court in 'A Carefully Planned Scheme Calculated to Deceive the Court'"**

Plaintiffs' proposed findings and conclusions, submitted after trial on the merits, maintained their pre-trial position in

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6. Recklessness was mentioned solely as a subcomponent of one possible alternative state of mind with which some false statements may have been committed within the framework of the deliberately designed overall "scheme and plan." *Id.* ¶2(d). Even in that context, plaintiffs charged the alleged wrongdoers with actual knowledge of their recklessness and the role which their acts played in the "scheme and plan."

every respect. Factually, plaintiffs adhered to their charges of a "scheme and plan," specifically repeating, as a proposed finding of fact, the complaint paragraph integrating all charged misconduct into the scheme and plan. (App. Supp. App. at 1520 ¶ 58.) The alleged acts comprising that "scheme and plan," necessarily required deliberate planning and execution (Aple. Supp. App. at 1520-34, *passim.*)(*e.g.* "false instructions," "false objections," (*id.* ¶ 61) the attorney's statements to the court "were designed to . . . conceal the [Audi\VWAG] relationship." (*Id.* ¶ 62))

Plaintiffs specifically claimed to have proven "the involvement of an officer of the court in 'a carefully planned scheme calculated to deceive the court:'"

> 4. The evidence establishes that the Court was intentionally lied to and that those lies were relied upon by the Court when it excluded Exhibits 45-49 in the underlying case. . . . [T]hat is the equivalent of the destruction of evidence . . . Such fraud is directed to the judicial machinery itself. When that occurs, as here, it is the equivalent of and at the same level as bribery of a judge or bribery of a jury. . . .
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> 6. An attorney is an officer of the court. While he should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary, his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. When he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.
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> 7. *The involvement of an officer of the court in "a carefully planned scheme calculated to deceive the court"* is the type of misconduct that warrants . . . the entry of a judgment in favor of the plaintiff when, as here, the fraud

> is perpetrated by the defense. . . . *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)

(Aple. Supp. App. at 1538-40) (emphasis added)(citations other than *Hazel-Atlas* omitted).

**The District Court's Dispositive Factual Finding — "Nowhere . . . Does There Appear Clear and Convincing Evidence That Defendants' Counsel Was Involved in a 'Deliberately Planned and Carefully Executed Scheme' to Defraud this Court" — The District Court Declines to Make Factual Findings as to the Audi/VWAG Relationship**

The district court found for defendants in its September 17, 1992 Order and Judgment. Nothing in the district court's review of plaintiffs' claims or of the governing law (App. at 39-46) suggests any change in the district court's view that "if the facts alleged are true, they constitute fraud on the court." *H&R v. Robinson*, Opp. at 2. However, the district court clearly and directly rejected plaintiffs' claims to have proven "the involvement of an officer of the court in 'a carefully planned scheme calculated to deceive the court:'"

> . . . [N]owhere in this meticulously prepared and effectively argued claim does there appear clear and convincing evidence that Defendants' counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud this Court through misrepresentation and nondisclosure.

(App. at 47).

Immediately before its dispositive factual finding, the district court's opinion includes the following passage:

> As a preliminary matter, the Court must concede that had it been apprised of the material contained in Plaintiffs' Proposed Findings of Fact and Conclusions of Law (FF/CL), filed July 27, 1992, at pp. 38-42 (nos.53-55), the . . . exhibits at issue would most assuredly have been admitted into evidence. Indeed, it seems fair to say that if the relevant corporate relationships set forth in Plaintiffs' FF/CL, cited above had been on record, VWAG would have been joined as a party defendant. And the Court so finds.

*Ibid.* The district court's conclusion that the "material contained in [plaintiff's proposed findings 53-55],"[7] if true, would have affected the admissibility of the documents and the status of VWAG in the lawsuit, clearly reaffirmed its earlier ruling that plaintiffs claims, if true, stated a case under Rule 60(b). However, the district court carefully avoided making any finding as to the truth of the "material contained in plaintiffs' proposed findings 53-55]."

Plaintiffs responded to the district court's Order and Judgment by moving, post-judgment, for supplemental findings adopting their proposed findings 53-55 referenced in the district court's decision. (Aplt.App. at 179-83) The stated rationale for plaintiffs' motion was "clarification" of "what we perceive to be the thrust of [the district court's] order and judgment." (Aplt.App. at 174) The district court denied the motion. (Aplt.App. at 210) In denying plaintiffs'

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7. The proposed findings detailed plaintiffs' contentions as to the VWAG/Audi relationship. As the Court of Appeals noted, these contentions were comprehensively controverted. App at 10-11.

motion, the district court confirmed that no such findings had been intended.[8]

**The Appeals and Decisions Below**

Before the Court of Appeals, plaintiffs claimed to raise no challenge to the district court's finding on a factual basis, but instead assailed it as a legal ruling adopting an impermissibly narrow view of fraud on the court. As Petitioners have noted, the Court of Appeals met and disposed of this claim squarely on the law, finding that the district court's determination was not erroneous. App. at 18-20. For the reasons set forth in the body of argument, we submit that the Court of Appeals' decision was correct.

It is important to note, as the Petition does not, that the Court of Appeals identified two alternative and independently sufficient factual bases for affirmance of the district court's decision. First, the circuit upheld the district court's dispositive factual finding as "directly responsive to the claim asserted by plaintiffs:"

> Although plaintiffs now maintain that the trial court's opinion shows that it misunderstood that scope of fraud on the court, in fact the court's dispositive finding was directly responsive to the claim asserted by plaintiffs. *See* . . . Pretrial Order, Plaintiffs' Contentions, App. E, ¶ 3 ["Plaintiffs contend that the representations to the court and answers to the interrogato-

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8. See *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)("a page of history is worth a volume of logic")(Holmes, J).

ries were part of a scheme and plan to deceive the court, "][quoted *supra* at 8.][9]

In a footnote to the quoted passage, the Court of Appeals supplied a second alternative ground for affirmance on the facts:

> It is clear that the district court's ruling was based upon a lack of any intent to defraud the court. We would also point out, however, that notwithstanding the court's "finding" that had it known the corporate relationships it would have admitted the NHTSA submissions and Volkswagen AG would have been made a party, *the district court made no finding that the representations made by Audi's attorney were false. Although plaintiffs argue that the statement that Volkswagen AG "had nothing whatever" to do with the design or manufacture of the Audi 100 LS is "just not true," such a representation can be reasonably viewed as a true statement of the legal relationship between these companies.* [Defense counsel's] comments could clearly be considered a good faith legal argument.

App. at 20-21 n.6 (emphasis added).

Finally, given the fundamentally factual nature of plaintiffs' discomfiture with the outcome at trial, the Court of Appeals for good measure affirmed the district court's factual finding based upon the evidence:

> Although plaintiffs deny that they are challenging the district court's factual determination, much of their briefs is devoted to arguing that the evidence shows that Audi's attorney acted with an intent to deceive.

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9. This passage completes the paragraph in the Court of Appeals' opinion which the Petition partially quotes, Pet. at 11, without indicating the elision.

> We have reviewed the record and are satisfied that the district court's finding is not clearly erroneous.

App. at 21.

In addition to challenging the district court's dismissal of their fraud on the court claims, Petitioners appealed the district court's later dismissal of their Oklahoma common law action. (App. at 48-55) This action asserted claim in negligence, product liability and fraud against Herzfeld & Rubin, P.C. ("H&R") and VWAG, the two alleged wrongdoers who were not parties to the underlying judgment. Because the common law claims were based upon factual allegations identical to those in the fraud on the court claims, the appeals were heard together.

The Court of Appeals held that, because the judgment in the underlying product liability suit precluded their showing any damages from the loss of the prior suit, "the district court was correct insofar as it concluded that plaintiffs could not pursue their claims for damages without first seeking relief from the [underlying product liability] judgment. However, the district court was incorrect in stating that any request for relief from the judgment was barred by the one year time limit placed on motions under Fed.R.Civ.P. 60(b)." App. at 31-32.

Nevertheless, the circuit court affirmed the dismissal of the action on three additional alternative grounds. First, the Court of Appeals held that plaintiffs' tactical approach, a state law fraud claim for "damages" allegedly caused by a valid adverse judgment, was not permissible under Oklahoma law. *Id.* at 31 n.4, citing *Terrel v. Gotcher*, 174 P.2d 229, 230 (Okla. 1946). The second and third alternative grounds of affirmance were based upon issue preclusion derived from the circuit court's own review of the record. The Court of

Appeals began by holding that, if plaintiffs were taken at their word that they were not seeking relief from the product liability judgment in the underlying action, "the common law fraud claims are barred because they are inconsistent with facts underlying the prior judgment." App. at 33. Alternatively, the Court of Appeals analyzed the action as an independent action in equity for relief from a judgment, as preserved by the "savings clause" of Rule 60(b), Fed.R.Civ.P. The complete overlap between the factual allegations in the common law case and plaintiffs' charges of "fraud on the court" which had been rejected on the facts in the companion action, however, foreclosed any further proceedings:

> Clearly, the equitable principles recognized by the courts authorize relief from judgments in certain cases of fraud. [footnote] We think it cannot be fairly disputed, however, that in addressing plaintiffs' claim of "fraud on the court" in *Robinson v. Audi AG*, No. 92-5238(10th Cir.), the trial court expressly rejected as unsupported by the evidence the same factual basis now asserted by the plaintiffs as justification for avoiding the prior judgment.
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> In their "fraud on the court" complaint plaintiffs set forth allegations of fraud identical in all material respect to those asserted in the [common law] complaint . . . The trial court conducted a bench trial on those allegations and, after hearing all of the evidence, concluded that there was no clear and convincing evidence that Audi's attorney . . . engaged in a scheme to defraud the court . . . Plaintiffs have identified nothing that would indicate they did not have a full and fair opportunity to present their claims of fraud in that forum. . . The trial court's finding is simply incompatible with the allegations of fraud in the complaint against Volkswagen AG and H&R and

precludes relitigation of the fraud issue in this action. *Bulloch v. Pierson*, 768 F.2d 1191, 1193 (10th Cir. 1985)

App. at 34-35.

## SUMMARY OF ARGUMENT

Petitioners lost at trial because they presented no proper proof whatever of the "shocking ubiquity of fraud" they had alleged. The effort to manufacture issues of law from their loss on the facts by palming off their discredited claims as uncontroverted fact, which the Court of Appeals saw through and rejected, unfortunately continues in the present Petition.

The district court's single dispositive finding was a purely factual determination, which was "directly responsive to the claim asserted by plaintiffs." Moreover, as the decision below reflects, "the district court made no finding that the representations . . . were false," and the attorney's statements to the district court at the first trial "could clearly be considered a good faith legal argument." App. at 20-21, n.6. There is no basis for this Court to review the unmixed factual determinations below.

The purportedly conflicting circuit court decisions referenced in the Petition are distinguishable on their facts. In addition, the Third Circuit decision which Petitioners invoke has had no discernable impact whatever upon federal jurisprudence. The Court of Appeals correctly decided this case.

The lower courts are in no need of supervisory direction with respect to fraud on the court. The reported cases conclusively demonstrate that the courts can and do readily discern and decisively redress such misconduct — provided only that it is proven.

## REASONS FOR DENYING THE WRIT

### I. THE DECISION BELOW AFFIRMED A PURELY FACTUAL REJECTION OF PLAINTIFFS' CHARGES, AND THE RECORD COMPELS THE CONCLUSION THAT DEFENDANTS' COUNSEL SPOKE THE TRUTH IN GOOD FAITH. THERE IS NOTHING WORTHY OF THIS COURT'S REVIEW

Little need be added to the Statement of the Case on this point. As to the claims of "fraud on the court," the Court of Appeals, after pointedly noting that "the district court made no finding that the representations made by Audi's attorney were false," examined the record for itself and found substantial support both for the truth of those representations and for the good faith with which they were made. (App. 20 n.6) This conclusively establishes in this Court, as a matter of law, that the statements in question were truthful and made in good faith. For reasons which need not be belabored further, this determination disposes of the entire Petition.

Petitioners have never disputed that fraud on the court, like any fraud, must be proved by clear and convincing evidence. E.g. App. at 18, citing *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st. Cir. 1989); *Booker v. Dugger*, 825 F.2d 281, 283-84 n.4 (11th Cir. 1987), *cert. denied* 485 U.S. 1015 (1988)("[T]he policy of finality of judgments requires that [clear and convincing], if not more stringent, standards be applied to independent actions alleging fraud on the court. . ."), citing *Johnson Waste Materials v. Marshall*, 611 F.2d 593, 600 (5th Cir. 1980); *Rozier v. Ford Motor Company*, 573 F.2d 1332 (5th Cir. 1978); *United States v. Standard Oil Co. of California*, 73 F.R.D. 612 (N.D.Cal. 1977), *aff'd*, 412 U.S. 924 (1973). See generally *Woodby v. INS*, 385 U.S. 276, 285, n.18 (1966)(A requirement of clear and convincing proof, "or an

even higher one, has traditionally been imposed in cases involving allegations of civil fraud. . .")

Under the "clear and convincing" standard in fraud cases, the fact finder case must adopt any reasonable view of the evidence which negates fraud. *Tyler v. Hartford Accident & Indemnity Co.*, 195 Okl. 523, 159 P.2d 722, 725 (Okla. 945)("when a transaction is fairly susceptible of two constructions, one which will free it from imputation of fraud will be adopted"). Accord, *Barnett v. Life Insurance Co. of the Southwest*, 562 F.2d 15, 19 (10th Cir. 1977); *Federal Deposit Insurance Corp. v. Palermo.*, 815 F.2d 1329, 1335(10th Cir. 1987) ("Fraud is never presumed; the evidence must be 'clear, strong and convincing and such as to rebut every presumption of honesty and fair dealing.'") In cases under Rule 60(b), this requirement is subsumed within the broader principle that the court must resolve all doubts in favor of finality. *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985), *cert. denied* 474 U.S. 1086 (1986); *Great Coastal Express, Inc. v. Int'l Brotherhood of Teamsters*, 675 F.2d 1349, 1355 (4th Cir. 1982). A record that reasonably supports a factual conclusion negating fraud therefore mandates such a finding.

Below, the Tenth Circuit found substantial record support for the proposition that the attorney charged with the alleged "scheme and plan to deceive the court" spoke the truth to the court and "clearly" did so in good faith. App. at 20 n.6. This determination, which Petitioners do not challenge (or indeed even mention),[10] thereby conclusively establishes

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10. *Cf.* Pet at 21 ("Petitioners submit that there is no more fundamental and important requirement for the effective and fair functioning of the federal [judicial] system than the requirement of candor to the court.")

the truth and good faith of the key statements, mooting the entire Petition.

In addition, on the record in this case, the district court's dispositive ruling was a direct, comprehensive factual rejection of plaintiffs' claims, which they specifically articulated after trial as claiming "the involvement of an officer of the court in a carefully planned scheme to deceive the court." *Supra* at 9. A "scheme and plan," in this or any other case, can only result from conscious design and intent.[11] Even the most casual reading of the district court's decision demonstrates that, had the court found the alleged "scheme and plan" to have been proven, it would have found itself compelled to set aside the prior judgment. No legal issue can therefore arise from its purely factual rejection of the specific charges made by the plaintiffs, in virtually the exact words of their proposed post-trial conclusion on the issue, or from the affirmance of that outcome by the Court of Appeals. The factual rejection of an unproved claim, in terms "directly responsive to the claim asserted by plaintiffs," App. at 21, raises no issue which merits this Court's consideration.[12]

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11. E.g. *Random House Unabridged Dictionary* (2d. ed. 1993):
**scheme** . . . 1. a plan, design, or program of action to be followed; project. (p. 1713)
**plan** . . . 1. a scheme or method of acting, doing, proceeding, making, etc., developed in advance: *battle plans.* (p. 1480)

12. The Court of Appeals' determination as to the preclusive effect of this determination upon the common law fraud action below (App. at 35) is neither challenged, or again even mentioned, in the Petition.

## II. THE CIRCUIT COURT DECISIONS WHICH PETITIONERS CLAIM CONFLICT WITH THE DECISION BELOW ARE DISTINGUISHABLE ON THEIR FACTS., AND, IN THE CASE OF THE THIRD CIRCUIT, ARE OF LITTLE IF ANY CURRENT INFLUENCE. THE COURT OF APPEALS DECIDED THIS CASE CORRECTLY.

Petitioners claim to discern major conflicts with decisions in other circuits. For the reasons discussed immediately above, we submit that any such asserted conflict is mooted by the purely factual bases upon which decisions below firmly rest. Nevertheless, just as the Court of Appeals, though under no compulsion to do so, considered and rejected the legal challenges which plaintiffs raised below, we now consider and urge this Court to reject Petitioners' claims of intercircuit conflict.

*Demjanjuk v. Petrovsky*

Petitioners point first to *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied*_ U.S. __, 115 S.Ct. 295 (1994), as conflicting with the Tenth Circuit's view that "fraud on the court, whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court." App. at 19. As Petitioners observe, the Tenth Circuit took specific note of language in *Demjanjuk* that "'a scheme based on a subjective intent to commit fraud' is not required because 'reckless disregard for the truth is sufficient.'" App at 18; *Demjanjuk*, 10 F3d. at 353. The Tenth Circuit did not delve further into the matter, electing instead to adopt the view of the overwhelming majority of courts, which have held, in varying formulations, that "a violation of the duty of honesty is essential to a finding of fraud on the court." App. at 20; see *id.* at 18-20, *passim*. The circuit court made no

further mention of *Demjanjuk*, and in particular made no mention of a conflict. We submit that there is none.

In fact, in the very passage quoted by the Tenth Circuit, the Sixth Circuit in *Demjanjuk* made clear that it was not adopting a general rule for fraud on the court in private civil litigation, by carefully limiting its holding to "cases such as this one." 10 F.3d at 353. The factors distinguishing *Demjanjuk* from virtually any other type of case involving charges of fraud on the court are self-evident. First, in *Demjanjuk* the party which failed to disclose critical exculpatory information to which it had exclusive access was the United States. Second, although the underlying litigation in *Demjanjuk* was technically a "civil" denaturalization proceeding, the stakes involved not merely revocation of citizenship, but extradition to Israel to face trial on charges of mass murder allegedly committed as a guard in the Nazi death factory at Treblinka during the Second World War. These charges were capital crimes without a statute of limitations in Israel. In this *sui generis* context, the Sixth Circuit found the case controlled by *Brady v. Maryland*, 373 U.S. 83 (1963), under which "the suppression by the prosecution of evidence favorable to an accused upon request violates due process . . ., *irrespective of the good faith or bad faith of the prosecution.*" *Id.* at 87 (emphasis added) The application of *Brady* renders *Demjanjuk* irrelevant to purely private civil litigation such as this case. Recognizing the unique situation before it, the Sixth Circuit carefully avoided potential conflict with the unanimous rule in other circuits, by specifically acknowledging that "there are cases holding that a 'plan or scheme' must exist in order to find fraud on the court," 10 F.3d. at 352-53, while confining its recklessness standard to quasi-criminal "cases such as this one." *Ibid.* There is no need to resolve a "conflict" which *Demjanjuk* itself effectively avoided.

***Averbach v. Rival Mfg. Co.***

Petitioners also claim that the decision below in No. 93-5168, their purported "common law" action, conflicts with *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3d. Cir.), *cert. denied*, 482 U.S. 915, 484 U.S. 822 (1987). Once again, a key factual distinction between the cases obviates the conflict. In addition, the idiosyncratic *Averbach* doctrine which Petitioners invoke appears to have had no effect whatever on federal jurisprudence, rendering any divergence between it and the majority rule followed below academic.

In *Averbach*, the Third Circuit, alone among federal circuits which have considered the issue, held that relief from a judgment more than one year after entry need not be premised upon fraud on the court or some other extraordinary circumstance encompassed in the "savings clause" of Rule 60(b). Instead, *Averbach* allowed such relief to be sought on the basis of allegations of common law fraud asserted in a diversity action for damages triable to a jury under state law, even where the same factual allegations would be time-barred under Rule 60(b)(3)as "fraud .. misrepresentation or other misconduct of an adversary." The Third Circuit held that "the elements of a cause of action for . . . relief [from a federal judgment] in an independent action are not different from those elements in a Rule 60(b)(3) motion [based upon fraud or other misconduct of an adversary]." 809 F.2d at 1012-13. In this regard, the Third Circuit espoused a more lenient standard than did the court below, which found that the permissible grounds for an independent action for relief from a judgment filed more than one year after entry of the judgment are "considerably narrower than common law fraud," and indeed virtually indistinguishable from fraud on the court under Rule 60(b). App. at 34 n.6. Respondents regard the Tenth Circuit view on these issues, which is

unanimously supported by all other decided circuit court cases, as the correct one. However, there is no reason for this Court to address the issue in this case.

In the first place, one of the essential building blocks for the *Averbach* approach, a body of state law which would permit a common law fraud action otherwise barred by a valid extant federal judgment, is not present here. As the Tenth Circuit noted, Oklahoma has specifically rejected the notion that a common law suit may be maintained for "damages" caused by an extant adverse judgment. App. at 31 n.4. The lack of Oklahoma law supporting plaintiffs' claims clearly distinguishes *Averbach*, which predicated its allowance of relief from a federal judgment under principles of state law on its finding that the state of Pennsylvania would recognize the theory of plaintiffs' case. 809 F.2d at 1019.

In addition, the doctrinal differences between the decision below and *Averbach* would appear to be of academic interest only. Respondents' research has revealed that, while the case has been cited on other points, the unique approach to relief from judgments taken in *Averbach* has never been followed, or even discussed, by any federal court, in the Third Circuit or elsewhere, since the decision issued. All other circuits hold that equitable proceedings under Rule 60(b) provide the exclusive means of relief from judgments in the federal courts.[13] The one post-*Averbach* decision on this

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13. E.g., *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 833 (7th Cir. 1985)("The principles developed in the application of Rule 60(b) ... are the sole means of attack on final civil judgments."); *Villareal v. Brown Express Inc.*, 529 F.2d 1219, 1221 (5th Cir. 1976); *Vassos v. Societa Trans-Oceania Canopus*, 272 F.2d 182, 183 (2d Cir. 1959), *cert. denied*, 362 U.S. 935 (1960).

point does not mention the case, even to distinguish it.[14] Until and unless *Averbach* has some discernible influence upon other cases, there is no pressing need to address its unique features. See, e.g. *McCray v. New York*, 461 U.S. 961, 963 (1983)(Stevens, J.)(certiorari denied where issue requires "further study" in lower courts); *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J., addressing dissent from denial of certiorari to "those of my Colleagues who . . . believe that this Court should postpone consideration of the issue until more . . . courts have experimented with substantive and procedural solutions. . .")

Lastly, for the reasons so cogently set forth in the opinions below, we submit that the decisions of the circuit court in this case were correctly decided. "Fraud on the court," virtually the only basis upon which a final judgment may be set aside regardless of the passage of time, self-evidently must be narrowly defined, unless final judgments are simply to become way stations in endless litigation of every case with a sufficiently large potential payoff. (App. at 19) Though not essential to the outcome in this case, the Court of Appeals' decision requiring a showing of a departure from the standard of honesty expected of all attorneys in cases of alleged fraud on the court is in agreement with the view of all circuits which have considered the matter in the context of private civil litigation. (*Id.* at 18, and cases cited) Plaintiffs' attempted common law end-run around Rule 60(b) was properly dismissed as doubly precluded, first by the extant valid judgment in the underlying suit, and second by the district court's comprehensive rejection of plaintiffs'

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14. *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 71 (2d Cir. 1990)(an independent action under Rule 60(b) "is not an action at law but is one addressed to the court's equity powers".)

charges of wrongdoing on the facts. Nothing in these determinations raises any issue meriting the involvement of this Court.

## III. The Lower Courts are in no Need of This Court's supervision.

Petitioners conclude by portraying the federal judiciary as helpless in the face of an epidemic of fraud. *Cf.* Pet. at 20-24. This apocalyptic vision does not jibe with reality. Indeed, in each of the cases cited at page 20 of the Petition as evidencing the supposed onslaught, the court, far from being impotent, *upon proof of fraud on the court*, set the relevant judgments aside or otherwise granted effective relief. The federal courts are both alert for improper conduct, and fully capable of dealing with it appropriately.

The unique confluence of the *Brady* doctrine and Rule 60(b) in *Demjanjuk* illustrates that fraud on the court can assume varied and not always entirely predictable guises. *Aoude v. Mobil Oil Corp.*, 892 F.2d at 1118 ("Because corrupt intent knows no stylistic boundaries, fraud on the court can take many forms.") Careful yet flexible application of the federal courts' inherent powers, informed in the first instance by the district courts' experience of the day-to-day realities of litigation, is more than sufficient to cope with real, as opposed to imagined, misconduct by officers of the court.

In this case, the district court which was allegedly defrauded found no factual support whatever for the charges which plaintiffs had so long and so stridently asserted. The circuit court affirmed on the facts, agreed on the law, and properly applied principles of claim and issue preclusion to cut off plaintiffs' attempted collateral attack on the adverse judgments in the underlying case.

There was neither error in the proceedings below, nor was the outcome of importance to anyone but the battle-weary litigants. Nearly two decades after the events which set this litigation in motion, the time has finally come to apply the principle of "enough is enough."

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## CONCLUSION

The Petition should be denied.

Respectfully submitted.

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